

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the matter of )  
)  
Competitive Telecommunications )  
Association, Florida Competitive Carriers )  
Association, and Southeastern Competitive )  
Carriers Association )  
) CC Docket No. 98-39  
Petition On Defining Certain Incumbent )  
LEC Affiliates As Successors, Assigns, or )  
Comparable Carriers Under Section 251(h) )  
of the Communications Act )

**BELL ATLANTIC COMMENTS****Introduction and Summary**

The Bell Atlantic telephone companies<sup>1</sup> ("Bell Atlantic") respectfully urge the Commission to reject the CompTel Petition both because it is an untimely request to reconsider issues the Commission has already resolved and because it is contrary to the 1996 Act and related common law principles.

The CompTel Petition asks the Commission to find that a Bell company affiliate is an "incumbent local exchange carrier" under the Telecommunications Act if it "is providing wireline local exchange or exchange access service in the [Bell company's] region under the same or similar brand names." CompTel Petition at 11. CompTel seeks

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<sup>1</sup> The Bell Atlantic telephone companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc., New York Telephone Company and New England Telephone and Telegraph Company.

this finding in order to saddle Bell company affiliates with resale and unbundling obligations under Section 251(c).

The Commission has already decided these issues and declined to make the finding CompTel requests. Under the Commission's rules, Bell companies are entitled to establish affiliate companies that offer local exchange and long distance service and use the Bell companies' brand names, but are not "incumbent local exchange carriers." The only time a Bell company affiliate has Section 251(c) obligations is where the Bell company transfers to that affiliate any network elements that must be provided on an unbundled basis.

Moreover, CompTel's contention that a Bell company affiliate becomes a "successor" or "assign" of an incumbent local exchange carrier simply by offering local exchange services under the Bell company's brand names is at odds with common law definitions of those terms. A "successor" or "assign" is someone who takes the place of another person who has left. It is not someone who performs an activity that another person continues to perform.

**I. THE COMMISSION HAS ALREADY DECIDED THAT BELL COMPANY AFFILIATES CAN PROVIDE LOCAL EXCHANGE AND LONG DISTANCE SERVICE AND USE THE BELL COMPANY'S BRAND NAMES WITHOUT BECOMING AN "INCUMBENT LOCAL EXCHANGE CARRIER."**

The requests made in the CompTel Petition are not new ones. The Commission considered – and rejected – them when it promulgated rules for establishing long distance affiliates under section 272. The Commission's decision applies directly here for the simple reason that there, as here, the Commission had to decide whether the activities

cited by CompTel made the affiliates successors or assigns of the Bell operating companies, *see* 47 U.S.C. § 153(4)(B), or whether the affiliates remained separate from the incumbent local exchange carrier.

In those previous proceedings, “several potential local competitors argue[d] that BOCs . . . might be able to circumvent the separation requirements of section 272 by creating an integrated affiliate that offers a combination of local, intraLATA, and interLATA services.” *Implementation of the Non-Accounting Safeguards of Sections 271 and 272*, 11 FCC Rcd 21905, ¶ 305 (1996) (“*Non-Accounting Safeguards Order*”). The Commission noted that “[o]ne of Teleport’s concerns is that the BOC or its parent may choose to upgrade the section 272 affiliate’s network rather than the incumbent LEC network in order to avoid the obligation imposed by section 251(c) of the Act to offer such facilities, and the new services they are capable of providing, to their competitors.” *Id.*

The Commission rejected these arguments. The Commission concluded that “section 272 does not prohibit a section 272 affiliate from providing local exchange services in addition to interLATA services, nor can such a prohibition be read into that section.” *Id.* ¶ 312. The Commission also “conclude[d] as a matter of policy that regulations prohibiting BOC section 272 affiliates from offering local exchange service do not serve the public interest . . . [and] agree[d] with the BOCs that the increased flexibility resulting from the ability to provide both interLATA and local services from the same entity serves the public interest, because such flexibility will encourage section 272 affiliates to provide innovative new services.” *Id.* ¶ 315.

The Commission also found that “a BOC affiliate should not be deemed an incumbent LEC subject to the requirements of section 251(c) solely because it offers local exchange services.” *Id.* ¶ 312. And the Commission correctly held that a Bell company affiliate is neither a “successor” or “assign” under Section 251(h)(1) nor a “comparable company” under Section 251(h)(2) “merely because it is engaged in local exchange activities.” *Id.*

The Commission also rejected CompTel’s request to prohibit section 272 affiliates from using the Bell company’s brand name. In fact, the Commission not only permitted a section 272 affiliate to use the Bell company’s brand name, it also permitted the Bell company and its section 272 affiliate to share services (other than operating, installation and maintenance) and jointly own property (other than transmission and switching facilities and the land and buildings where those facilities are located). 47 C.F.R. § 53.203. The only “transfer” of assets from a Bell company to its section 272 affiliate that triggers Section 251(c) obligations is a transfer of network elements: “if a BOC transfers to an affiliated entity ownership of any network elements that must be provided on an unbundled basis pursuant to section 251(c)(3), we will deem such entity to be an ‘assign’ of the BOC under section 3(4) of the Act with respect to those network elements.” *Non-Accounting Safeguards Order*, ¶ 309.

## **II. A BELL COMPANY AFFILIATE THAT PROVIDES THE SAME SERVICES THAT A BELL COMPANY CONTINUES TO PROVIDE IS NOT A SUCCESSOR OR ASSIGN.**

The CompTel Petition argues that a Bell company affiliate providing local exchange services under the Bell company’s brand name is a “successor or assign”

regardless of whether the Bell company continues to provide those same services.

CompTel Petition at 8. This argument ignores fundamental common law principles.

Under common law, there can be no successor or assign where the Bell company actively continues to provide local exchange service. A successor “takes the place that another has left, and sustains the like part or character.”<sup>2</sup> Similarly, an assignor must be “divested of all control over the thing assigned.”<sup>3</sup> In other words, the Bell company must cease to perform its role as a local exchange carrier and the successor or assign must take its place.

In the absence of any finding that a Bell company has ceased to provide a service that is now provided by that Bell company’s affiliate, there can be no “successor or assign.” The CompTel Petition provides no basis for making such a finding.

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<sup>2</sup> *Safer v. Perper*, 569 F.2d 87, 95 (D.C. Cir. 1977) citing *Wawak Co. v. Kaiser*, 90 F.2d 694, 697 (7th Cir. 1937).

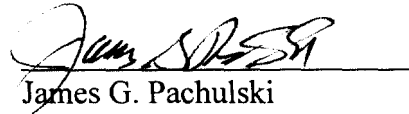
<sup>3</sup> *Miller v. Wells Fargo Bank International Corp.*, 540 F.2d 548, 558 (2d Cir. 1976) citing *Coastal Commercial Corp. v. Samuel Kosoff & Sons, Inc.*, 10 A.D. 2d 372, 376 (4<sup>th</sup> Dep’t 1960).

**CONCLUSION**

The Commission should reject the CompTel Petition.

Respectfully submitted,

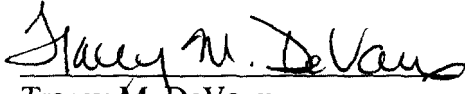
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CERTIFICATE OF SERVICE

I hereby certify that on this 1<sup>st</sup> day of May, 1998 a copy of the foregoing "Bell Atlantic Comments" was sent by first class mail, postage prepaid, to the parties on the attached list.

  
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